

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**GAUCHO LTD. d/b/a MCDONALD'S RESTAURANTS
and MCDONALD'S USA LLC, Joint Employers**

and

Case 28-CA-133060

**A.G.K. RESTAURANTS, INC. d/b/a MCDONALD'S
RESTAURANTS and MCDONALD'S USA LLC, Joint
Employers**

and

Case 28-CA-136545

WESTERN WORKERS ORGANIZING COMMITTEE

**GENERAL COUNSEL'S OPPOSITION TO RESPONDENT MCDONALD'S
USA, LLC AND A.G.K. RESTAURANT, INC.'S MOTIONS FOR A BILL OF
PARTICULARS OR TO STRIKE THE JOINT EMPLOYER ALLEGATIONS
AND DISMISS THE COMPLAINT**

On December 19, 2014, the Director of Region 28 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) setting forth allegations that the above-captioned Respondents violated Section 8(a)(1) and (3) of the Act. On December 29, 2014, Respondent McDonald's USA, LLC (McDonald's) filed a motion in Region 28 seeking a bill of particulars or, alternatively, for dismissal of the joint employer allegations in the complaint. On December 31, 2014, Respondent A.G.K. Restaurants, Inc. (AGK) similarly filed a motion in Region 28 seeking a bill of particulars or, alternatively, for dismissal of the joint employer allegations in the complaint.¹ The General Counsel responds to

¹ AGK's motion seeking a bill of particulars contains the same substantive arguments as McDonald's motion seeking a bill of particulars. This Opposition responds to both motions, collectively referred to as "Respondents' Motions."

Respondents' Motions by filing this Opposition, which is similar to the General Counsel's oppositions filed to similar McDonald's motions filed in other Regions.

A bill of particulars is justified only when the complaint is so vague that the party charged is unable to respond to the General Counsel's case. *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968); *American Newspaper Pub. Ass'n v. NLRB*, 193 F.2d 782 (7th Cir. 1952), *affd.* 345 U.S. 100 (1953).² The Complaint alleges the existence of a franchising relationship between McDonald's and various other entities—thereby complying with the suggestion of Section 300.5(b) of the National Labor Relations Board Pleadings Manual section (cited by McDonald's at Motion, p. 4 as Section 300.3(b)) to include a description of the business—and asserts that McDonald's "possesse[s] and/or exercise[s] control over the labor relations policies of" the other named entities, i.e., its franchises.³ This is sufficient notice to satisfy due process concerns. See e.g., *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) (In evaluating whether Respondent was afforded sufficient notice to satisfy due process, the court observed that "[n]otice does not mean a complaint necessarily must state the legal theory upon which the General Counsel intends to proceed."); *Swift & Co. v. NLRB*, 106 F.2d 87, 91 (10th Cir. 1939); *Bakery Wagon Drivers v. NLRB*, 321 F.2d 353, 356 (D.C. Cir. 1963) (Board complaints need not conform to the technicalities of common law pleading: "[i]t is sufficient if respondent 'understood the issue and was afforded full opportunity to justify its actions'" (citing *NLRB. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938))).

² McDonald's attempts to impose a more stringent standard by selectively quoting *Soule Glass and Glazing Co v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), which in turn quotes *J.C. Penney Co. v. NLRB*, 384 F.2d 479 (10th Cir. 1967), a case in which the court refused to enforce "a finding which was neither charged in the complaint nor litigated at the hearing," *id.* at 482. The full quote is "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet *and provide a full hearing upon the issue presented* is, of course, to deny procedural due process of law." *Id.* at 483. The inapplicability of both the holding and the quotation to the current situation should be plain.

³ The General Counsel maintains he has satisfied his pleading obligations; however, to the extent McDonald's argues the Complaint does not comply with the Board's Casehandling or Pleading Manuals, the General Counsel notes the Manuals contain guidelines, not requirements. *Benjamin H. Realty Corp.*, 361 NLRB No. 103, n.1. (2014).

Moreover, because no one is in a better position to know what facts support or undermine that allegation than McDonald's itself, McDonald's is fully able to respond to that allegation. Thus, no bill of particulars is justified and the motion must be denied.

Similarly, the complaint meets the requirements of Section 102.15 of the Board's Rules and Regulations, which provides in relevant part: "The complaint shall contain... a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Every act alleged by the Complaint to constitute an unfair labor practice, viz., paragraphs 7–8, identifies the approximate dates and places of those acts along with the identities of the actors.

McDonald's fails to cite any authority in support of its claim that the Complaint violates McDonald's Fifth Amendment rights. McDonald's also fails to address the well-established import of the section of the Administrative Procedures Act upon which it relies, viz., 5 U.S.C. § 554(b)(3). As numerous courts have held, the requirements of that statute are met when the party is apprised of the issues in controversy and not misled. See e.g., *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), cert. denied 409 U.S. 842 (1972); *Long v. Board of Governors of the Federal Reserve System*, 117 F.3d 1145, 1158 (10th Cir. 1997); *L.G. Balfour Co. v. FT*, 442 F.2d 1, 19 (7th Cir. 1971); *Boston Carrier, Inc. v. ICC*, 746 F.2d 1555, 1560 (D.C. Cir. 1984); *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972) ("[T]he purpose of the [Administrative Procedure] Act is satisfied, and there is no due-process violation, if the party proceeded against understood the issue and was afforded full opportunity to justify its conduct"; internal quotation marks omitted), cert. denied 412 U.S. 918 (1973). Because McDonald's has been informed that the General Counsel seeks to impose liability upon it for conduct committed by certain of its franchises by virtue of its status

as a joint employer of employees of those franchises, McDonald's has been given plain notice of the issue in controversy.

Finally, Respondent's argument for a bill of particulars, which appears to be grounded on the false premise that there is no precedent for the joint employer allegations, misses the point. Respondent, like the General Counsel is free to argue its theory of joint employer liability, without expressing those theories in its pleadings. The question posed by a Motion for a Bill of Particulars is still whether the complaint is so vague that McDonald's is unable to respond to the Complaint.⁴ For the reasons already discussed, McDonald's fails that test. For this and the other reasons cited above, Respondents' Motions should be denied in their entirety.

Dated at Phoenix, Arizona, this 21st day of January 2015.

/s/ Fernando Anzaldua

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⁴ The fact that McDonald's has filed an answer suggests that the complaint was not so deficient as to preclude an effective response, McDonald's statement that by filing an answer it has not waived its right to a bill of particulars notwithstanding (See e.g. McDonald's Answer par. 5(c)). The issue is not one of waiver, but whether as a factual matter McDonald's has sufficient notice of the allegations in the complaint to respond.

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S, MCDONALD'S USA, LLC AND A.G.K. RESTAURANT, INC.'S MOTIONS FOR A BILL OF PARTICULARS OR TO STRIKE THE JOINT EMPLOYER ALLEGATIONS AND DISMISS THE COMPLAINT., Cases 28-CA-133060 and 28-CA-136545, was served by E-Gov, E-filing, E-Mail, and/or U.S. mail on this 21st day of January 2015, on the following:

Via E-Gov, E-Filing:

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